Jury.
139-621
Fallon.
Argued March 30. 1891.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1271~~ ~~892~~ 574271

JOSEPH NATAL, JOSEPH HUG, ADAM GIMS, AUGUST SPRAUL, TIMOTHÉ ROUCHE, J. M. SABATHE, F. LAMARQUE, A. BLOCK, DOMINIQUE ROTJE AND THOMAS FALLON, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 21, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1271.

JOSEPH NATAL, JOSEPH HUG, ADAM GIMS, AUGUST SPRAUL, TIMOTHÉ ROUCHE, J. M. SABATHE, F. LAMARQUE, A. BLOCK, DOMINIQUE ROTJE AND THOMAS FALLON, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 28, 1887.

1 STATE OF LOUISIANA:

First Recorder's Court of the City of New Orleans.

THE STATE *vs.* JOE NATAL

(Erato and Liberty).

Personally appeared before me, Robert C. Davey, recorder of the first recorder's court of the city of New Orleans, and justice of the peace duly commissioned and sworn, off. McNally, 2 prec't, who, having been duly sworn, doth depose and say:

That on the 24th January, 1887, at the corner of Erato and Liberty, Thalia and Locust, Calliope and Rampart, and Calliope and Baronne streets, in this district and city, one Joe Natal did then and there violate sec. 4, ordinance 4798, page 282, J. D., all against the peace and dignity of the State.

Wherefore deponent charges the accused with violating sec. 4, ordinance 4798, page 282, J. D., and prays that he be arrested and dealt with according to law.

(Signed) FRANK McNALLY.

Sworn to and subscribed before me this 25th day of Jan'y, 1887.

[Seal Supreme Court of the State of Louisiana.]

(Signed) R. C. DAVEY, *Recorder.*

State witnesses:

—— ——.

—— ——.

2 First Recorder's Court of the City of New Orleans.

STATE OF LOUISIANA
vs.
JOSEPH NATAL. } No. 11180.

The defendant herein, Joseph Natal, appears, through his undersigned counsel, in this honorable court and, for answer as reasons for defense and why this prosecution should be dismissed and he be hence discharged therefrom, alleges—

1st. That the ordinance No. 4798 of the city of New Orleans in the year 1878 has been abrogated, annulled, and repealed and is no longer in force, and especially sections 1 and 4 of said ordinance, upon which this prosecution is based—that is to say, said ordinance 4798 of 1878 was adopted, as required by act No. 100 of the Legislature of the State of Louisiana of 1878, entitled "An act to regulate the private markets in the city of New Orleans, and for other purposes, being act number thirty-one of the session of the General Assembly for one thousand eight hundred and seventy-four, and to authorize the council of the city of New Orleans to pass ordinances

and make regulations for the government and regulation of private markets in said city," which act has been abrogated, annulled, and repealed by virtue of the provisions and powers enumerated in act No. 20 of the General Assembly of the State of Louisiana, approved June 23rd, 1882, entitled "An act to incorporate the city of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions, due public notice having been given in accordance with the requirements of article 48 of the constitution."

Defendant says that the city of New Orleans, a corporation of the State of Louisiana existing under the constitution of the State
3 of 1868 and the laws thereunder enacted, ceased to exist as such under the act No. 20 of 1882, above set forth; that the said city under the constitution of 1868 and the laws thereunder is not the same city of New Orleans as incorporated under act No. 20 either as to territorial limits or intendment of law; that the said act of 1878 vesting in the city of New Orleans at said date the power to regulate the markets in said city then existing has not been perpetuated, but ignored and abrogated, by the present act of incorporation by the Legislature of the State of Louisiana, and is therefore, in so far as this prosecution is concerned, an attempt to invoke a prosecution and usurp authority under an act of the General Assembly of the State of Louisiana and an ordinance of a city of New Orleans that have both ceased to exist and is in violation of the constitution and statutory law and the personal rights of your respondent in the premises.

That the said city ordinance under which defendant is prosecuted, as well as the act No. 100 of 1878 authorizing said ordinance, are inconsistent and in conflict with the provisions of act No. 20 of 1882 of the Legislature of the State of Louisiana incorporating the present city of New Orleans, and especially the seventh section thereof; that under the provisions of said act no reservation of power on the part of the city of New Orleans has been perpetuated under said act No. 100 of 1878 or said ordinance No. 4798 of the late city of New Orleans by which their provisions can be carried into effect; that in truth and in fact and in law said law and said ordinance have been abrogated and repealed, and that at present there is no law or ordinance regulating the public and private markets of New Orleans, and that therefore this prosecution is an usurpation of authority not warranted by law and in total disregard of the rights of respondent.

That the constitution of the State of Louisiana is violated
4 as regards the rights of respondent by reason of the attempted prosecution and deprivation of rights of respondent under an obsolete law and city ordinance.

Defendant further urges that even if said act of the General Assembly of the State of Louisiana was still in force with the ordinance of the late city of New Orleans No. 4798, still this prosecution could not be legally maintained against the defendant for those reasons; that said act No. 100 of 1878 was intended as a monopoly, which has been abrogated by article 248 and article 252 of the State con-

stitution of 1879, and as such is in violation of articles 5 and 14 of the Constitution of the United States, in this, that defendant is deprived of liberty and property without due process of law, and under said monopoly and the intendment of said law is abridged in his privileges and immunities as a citizen of the United States, and deprived of his liberty and property under said monopoly, and is thereunder deprived of his equal exercise of rights under the Constitution of the United States and the equal protection of its laws.

Respondent further urges that this honorable court is without authority of law to punish, in any manner or form, your respondent for carrying on his said business in the locality where he is charged; that said ordinance, repealed as aforesaid, which assumes to confer power upon this honorable court to punish by fine or imprisonment, is null and void and in violation of law, for the reason that no authority has been given to this honorable court to punish, either by fine or imprisonment and therefore the Legislature of the State of Louisiana not having clothed this honorable court with the power to punish in the premises in any manner or form, it is without jurisdiction and usurping authority.

5 For these reasons defendant urges that he should be dismissed.

(Signed) BELDEN & ARMBRUSTER, *Att'ys.*

6 By Mr. BLANC: I offer in evidence in all the cases which have been tried all the acts of the Legislature of the State in reference to private markets; the private-market ordinance and laws as found in Jewell's Digest, with the understanding of the counsel that the said ordinances may be had at any — on file from the mayor's office, city of New Orleans; with the further understanding that should it be necessary in case of appeal that a copy of said acts or ordinances as found in the acts of the Legislature in printed and volume form and Jewell's Digest as transcripts.

I offer the charter of the city of New Orleans, act of 1882; act No. 20.

Objection by Mr. BELDEN: We object to any ordinance or laws of the State of Louisiana introduced by the State other than ordinance 4798, under which the constitution is made for 1878, or act of the Legislature 100 of 1878.

We introduce the city charter of the city of New Orleans of 1882 and ordinance 4798.

7 First Recorder's Court, City of New Orleans.

STATE OF LOUISIANA
vs.
JOSEPH NATAL *et al.* } No. 11180.

On motion of Belden & Armsbruster and S. J. N. Smith, att'ys of defendant, it is ordered that a suspensive appeal be granted defendant herein to the supreme court of the State of Louisiana returnable thereto on the third Monday of February, 1887, upon his giving

bond, as required by law, in the sum of fifty dollars, conditioned as the law requires.

(Signed) R. C. DAVEY, *Recorder.*

8 *Motion and Order to Fix for Trial.*

Proceedings in the Supreme Court of Louisiana.

Extract from the Minutes of Tuesday, March 8th, 1887.

Court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Lynn B. Watkins, associate justices.

STATE OF LOUISIANA
vs.
JOSEPH NATAL *et als.* } No. 9935.

On motion of W. H. Rogers, city attorney, and of Blanc & Butler, of counsel for the State, and on their suggesting that the above-entitled and numbered causes are of great public interest and should be assigned for trial by preference, it is ordered that the same be fixed for trial on Saturday, March 12th, 1887, at 11 o'clock a. m., and notice hereof be given defendants.

9 *Sheriff's Return. Filed March 12th*, 1887.

Received March 9th, 1887, and on March 10th, 1887, I served copy of the within motion on Messrs. Belden & Armbruster, atty's-at-law, by personal service on Simeon Belden.

Ret. same day.

(Signed) B. McKENNA, *D'y Sh'ff.*

Sheriff's fee, $0.50.

Called & Appearance.

Extract from the Minutes of Saturday, March 12th, 1887.

Court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Lynn B. Watkins, associate justices.

STATE OF LOUISIANA
vs.
JOS. NATAL *et al.* } No. 9935.

This case was duly called for trial, and, after hearing argument of S. P. Blanc, attorney for plaintiff and appellee, was ordered submitted on the briefs and papers filed.

United States Supreme Court.

Nos. 1271, 1272, 1273, 1274.

PETITION OF JOSEPH HUG *et als*, PLAINTIFFS IN ERROR.

To the Honorable Judges of the Supreme Court of the United States holding sessions at the City of Washington, District of Columbia :

The petitioners herein, Joseph Hug, Timothé Rouche, August Spraul and Joseph Natal, residents of the city of New Orleans, and State of Louisiana, and citizens of the State of Louisiana, and the United States of America, represent to this honorable court that they are plaintiffs in error in suits Nos. 1271, 1272, 1273 and 1274 on the docket of this honorable court, entitled "the State of Louisiana *vs.* Joseph Hug, Timothé Rouche, August Spraul and Joseph Natal, separately and respectively. That in connection with said writs of error, bonds have been filed, and approved, and operate as supersedeas of further proceedings on execution of judgment or sentence of the lower court to whom writs of error were directed from this honorable court. That service of writ of error has been made on the city of New Orleans, the defendant in error, as shown by return of service thereof on the mayor of said city in the record in each writ of error pending in this honorable court as aforesaid.

Your petitioners now represent, that under said writ

UNITED STATES SUPREME COURT.

Nos. 1271, 1272, 1273 and 1274.

PETITION OF

JOSEPH HUG ET AL., Plaintiffs in Error.

Filed November 7, 1887.

J. HALE SYPHER,
Attorney.

10 *Final Decree and Opinion.*

Supreme Court of the State of Louisiana.

STATE OF LOUISIANA
vs.
J. NATAL *et al.* } No. 9935.

Appeal from first recorder's office, city of New Orleans.

CLERK'S OFFICE, NEW ORLEANS, *March 21st*, 1887.

Mr. Chief Justice Bermudez pronounced the opinion and decree of the court in the words and figures following, to wit:

The defendants appeal from judgments rendered against them for the payment of a fine and in default of payment sentencing them to imprisoment for the violation of ordinance No. 4798, A. S., which forbids the keeping of private markets within six squares of a public market within the limits of the city of New Orleans.

The facts are admitted.

Several defenses are set up, the main of which is that the law in furtherance of which the ordinance was adopted, as well as the ordinance itself, have been abrogated, annulled, and repealed, and are no longer in force; that therefore the fine imposed under the authority of the ordinance is illegal for want of a law, and that this court has consequently jurisdiction over the causes.

It is claimed that this repeal results from the adoption of the present city charter in 1882, with which the law conflicts.

11 The defendants further urge that the law of 1878, under the provisions of which the ordinance was passed, contemplated a monopoly and was abrogated by the present charter and is in violation of the Constitution of the United States.

We consider that these and other objections to the constitutionality or legality of the ordinance in question and others similar to it have been already considered and judicially determined in favor of the regulation.

Besides, the defendants in the instant cases have not urged them on appeal, and may be considered as having abandoned all resistance on those grounds. Dillon on Mun. Corp., 380; 3 La., 217; 4 A, 335; 27 A, 417; 31 A, 544; 36 A, 986 (No. 8603 of the docket of this court, not reported in full; also in cases Nos. 9582, 9583, 9584, not yet reported).

So that the only question now to be solved is whether the ordinance was or not repealed.

The ordinance in question, No. 4798, A. S., was adopted in 1878 under the provisions of act No. 100 of the Legislature previously adopted in the same year, the object of which was the regulation of private markets in the city of New Orleans. From that time to the present day it has uniformly been enforced; what resistance was ever made to its application having been judicially pronounced groundless and unauthorized.

The defendants in the present controversy, however, argue
12 that the city of New Orleans in existence at the date of the passage of the law and of the adoption of the ordinance has ceased to exist as such under the operation of act 20 of 1882, which is the charter of the city now in existence; that said law and said ordinance were not perpetuated, but were ignored and abrogated, by the last charter, and that the present prosecutions are attempts to enforce a defunct municipal regulation in violation of constitutional and statutory law and of the personal rights of the defendants.

The theory thus advanced rests upon the assumed proposition that the city of New Orleans in existence in 1878 is not the city of New Orleans in 1887.

This is a fallacy arising from a misconception and a confusion of ideas on the subject.

The city of New Orleans, founded by Bienville about 1718, has never ceased to exist as an agglomeration of human beings for social, commercial, and industrial purposes.

It is a growing fact which no legislation has ever blotted out and which no power can annihilate in a free country, although it be true that the form of government to which its inhabitants have been remitted or the mode in which it may exercise its rights and powers has from time to time been modified or changed. It is the *civitas* or *polis* of ancient times.

The inhabitants had a right to congregate and to establish a city for their greater comfort and welfare. In the absence of any
13 charter incorporating them they are, like the rest of citizens in the country, ruled by general laws enacted for the government of all throughout the territory.

In 1806 those inhabitants were given a charter for the first time since the session of 1803, and that charter has been altered or amended some way or another in subsequent years, 1812, 1818, 1833, 1836, 1837, 1848, 1850, 1852, 1870, and 1882, but the city, the existence of which was generally recognized by the various constitutions, has retained its identity, not only as a matter of fact, but also as a matter of legal necessity.

Whatever rights it originally possessed, whether because expressly conferred by the sovereign or because indispensably inherent to its nature and existence, it has continued to possess, unless where such rights have been recalled or denied by the properly constituted authority.

The present constitution, art. 254, gave authority to the General Assembly to cancel its charter and to remit its inhabitants to another form of government if necessary.

The Legislature did not, however, formally cancel its previous charter, although it changed the form of the municipal government.

This is apparent from the reading of the last section of the charter of 1882, which merely repeals the laws in conflict, inconsistent with, or contrary to the provisions of the act.

14 By irresistible and clear implication this section contemplates in effect the maintenance and continuation in force of

special laws not falling within the purview of the act, namely, not conflicting with it.

It will not do to say that in the beginning of the act it is declared that the inhabitants of the parish of Orleans were created a body corporate and established as a political corporation by the name of the city of New Orleans, for the fact is that the Legislature did not and could not create the city of New Orleans, which had existed long before the act of of 1882.

To create is to bring to life, to animate, to vivify that which never existed before.

What the Legislature did was to continue the city of New Orleans as a municipal corporation and to invest it with powers which it did not previously possess or to impose on it obligations to which it had not been subjected. The charter is the machinery whereby the city is put in motion and operates.

This is so true that the charter of 1882 transfers to the actual city all the rights of any nature whatever which the city then in existence possessed and enjoyed.

Sec. 28.

The laws which from time to time have been specially passed for the government and administration of the municipal affairs of the city of New Orleans have therefore continued in force, except
15 such as may have been modified or repealed, expressly or impliedly.

The same may be said of what ordinances and regulations which the city may have passed in furtherance of these laws.

Hence when the laws are modified or repealed the municipal legislation in pursuance thereof is altered or recalled, but when those laws remain unchanged, as in the present case, that municipal legislation continues in full force and effect, while it remains subject itself to modifications by its framers.

This proposition is so palpably evident that it is upon it that the defendants have built up the theory that the act of 1878, under the authority of which the ordinance in question was adopted, having been repealed, the ordinance in question, which is an outgrowth of it, has died away with it.

The city charter of 1882 does not purport to have repealed in any manner, expressly or impliedly, the act of 1878, which is a special law. On the contrary, as that act is in no way in conflict or inconsistent with or contrary to the provisions of the new charter, the irresistible inference is that it has continued in full force and that the ordinance passed in execution of it to regulate the distance at which private markets shall be kept from public markets has likewise continued in effect and must be enforced in all proper causes.

The conclusions which we have reached are supported
16 by good authority :

Dillon on Mun. Corp., 3d ed., Nos. 171, 172; City of Marysville *vs.* Shultz, 3 Dana, Ky., 11; City of Olney *vs.* Harvey, Ill. Rep. 50, 454; Trustees Erie Academy *vs.* City of Erie, Pa., R., 31, 519 ;

Frank *vs.* City of San Francisco, 21 Cal., 668; Girard Heirs *vs.* Philadelphia, 7 Wall., 1, and Broughton *vs.* Pensacola, 93 U. S., 266.

In this last case the highest tribunal of the land distinctly held that a change in the charter of a municipal corporation or the substitution of a new charter in place of the old one will not be deemed, in the absence of express legislative declaration, otherwise to effect the identity of the corporation.

See also Toullier Dr. Civ. Fr. L. L., T. 1, No. 202, Henry de Pansey Pouvoir Municipale, p. 36, 37; also 2 Woods, 632, Milner's Administrator *vs.* Pensacola.

It is therefore ordered and decreed that the judgment appealed from be affirmed with costs.

Rehearing refused April 11th, 1887.

17 *Petition for Rehearing. Filed March 25th*, 1887.

STATE OF LOUISIANA
vs.
JOS. NATAL *et al.* } No. 9935.

The petition of defendants herein represents that they believe that there is error to their prejudice in the decree herein affirming sentence of lower court, in this:

1st. Because the decree maintains the existence of ordinance 4798, which is inconsistent with and contrary to act of incorporation of 1882 of the city of New Orleans, and that it being inconsistent and contrary to said act, there being no officers to execute it, section 7 of the last act of incorporation requires new ordinances to be passed by the city council to meet the requirements of the city.

2d. Because the continuation of the corporation and the preservation and abrogation of its laws and ordinances is governed alone by the provision of the act of each incorporation, and in no instance has a law or ordinance been maintained unless expressly so declared.

3d. Because the decree has the effect of sustaining an ordinance which creates a monopoly in violation of the Constitution of the United States and the State of Louisiana, and by which the equal rights of defendants are not only abridged, but destroyed. They therefore pray for rehearing and for general relief.

(Signed) BELDEN & ARMSBRUSTER &
S. J. N. SMITH, *Att'ys.*

18 *Rehearing Refused.*

Extract from the Minutes of Monday, April 11th, 1887.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Chas. E. Fenner, Lynn B. Watkins, associate justices.

Absent: Rob't B. Todd, associate justice.

His honor the chief justice announced the decision of the court on application for rehearing in the following case:

STATE OF LOUISIANA
vs.
JOS. NATAL *et als.* } No. 9935.

Rehearing refused.

19 *Bond for Writ of Error. Filed May 12th,* 1887.

STATE OF LOUISIANA, *City of New Orleans:*

No. —.

Know all men by these presents that we, Joseph Natal, Joseph Hug, Timothe Rouche, Adam Gims, August Spraul, J. M. Sabathe, F. Lamarque, and A. Block, Dominique Rotge, and Thomas Fallow, each individually and *in solido*, as principals, and P. J. Donegan and John Kreiger, as surety, and both principals and surety being domiciliated and residing in the city of New Orleans, in the State of Louisiana, are held and firmly bound unto the city of New Orleans, a municipal corporation in the State of Louisiana, in the sum of one thousand dollars, or amount of all damages and costs which may be caused said city of New Orleans and State of Louisiana by reason of writ of error to the supreme court of the State of Louisiana from final judgment of said supreme court, being the highest court of law in the State of Louisiana, in the suit or prosecution entitled The State of Louisiana *vs.* Jos. Natal, Jos. Hug, Adam Gims, August Spraul, Timothe Rouche, J. M. Sabathe, F. Lamarque, and A. Block, Dominique Rotdge, and Thomas Fallow each; and for which payment, well and truly to be made, we and each of us bind ourselves, our heirs, executors, administrators, and assigns, *in solido*, firmly by these presents.

Dated, signed, and sealed this the 23d of March, 1887.

20 Whereas the said Jos. Natal, Jos. Hug, Adam Gims, August Spraul, Timothe Rouche, J. M. Sabathe, F. Lamarque, and A. Block, Dominique Rotge, and Thomas Fallow have this day obtained a writ of error to the supreme court of the State of Louisiana from the Supreme Court of the United States from a final judgment in proceedings rendered therein, entitled The State of Louisiana *vs.* Jos. Natal, Jos. Hug, Adam Gims, August Spraul, Timothe Rouche, J. M. Sabathe, F. Lamarque, and A. Block, Dominique Rotge, and Thomas Fallow, No. 9935 on the docket of the said supreme court:

Now, the condition of the above obligation is such — Joseph Natal, Joseph Hug, Thomas Fallow, Adam Gims, August Spraul, Timothe Rouche, A. Block, F. Lamarque, J. M. Sabathe, & Dominique Rotge, plaintiffs in error, shall pay all damages and costs caused the said city of New Orleans and State Louisiana should they and

each of them fail to make good his or their writ of error in the Supreme Court of the United States by the decision thereon.

(Signed) JOSEPH HUG.
" A. BLOCK.
" TIMOTHE ROUCHE.
" J'N M. SABATHE.
" A. GIMS.
" A. SPRAUL.
" JO. NATAL.
" F. (his mark) LAMARQUE.
" DOMINIQUE (his mark) ROTGE.
" THOS. (his mark) FALLOW.
" P. J. DONEGAN.
" JOHN KREIGER.

Witness to signatures:
(Signed) C. M. ILSLEY.

21 Personally appeared before me, the undersigned authority, P. J. Donegan and John Kreiger, who, being duly sworn, on oath declares that, over and above all his debts and obligations, he is worth in real estate and personal property, rights, and credits in the State of Louisiana the sum of one thousand dollars, and that he is worth in real estate and personal property upon which an execution could be levied and the money made more than sufficient to satisfy any damages that could result to defendant in error wherein this the above bond is given with deponent as security.

(Signed) P. J. DONEGAN.
" JOHN KREIGER.

Sworn to and subscribed before me this 4th day of May, '87.
[SEAL.] (Signed) C. M. ILSLEY, *Not. Pub.*

Endorsement: Supersedeas bond. Case of Natal *et al. vs.* State of Louisiana. In error to U. S. Supreme Court.

This bond is approved.
(Signed) JOSEPH P. BRADY,
Asso. Justice of the Sup. C't U. S.

22 *Assignment of Errors. Filed October 6th,* 1887.

STATE OF LOUISIANA
vs.
JOSEPH NATAL *et als.*, Consolidated. } No. 9935.

Defendant herein assigns as error and as a reason why judgment of supreme court of the State of Louisiana in the above-entitled case should be reversed and judgment rendered in defendant's favor on writ of error, 1st, that the court erred in holding that the law and ordinance of the State — Louisiana and city of New Orleans on which this prosecution is based have not been repealed by act No.

20 of the General Assembly of Louisiana of 1882 incorporating the city of New Orleans; 2dly, the court erred in decreeing that the city ordinance of the city of New Orleans No. 4798 and act No. 100 of the General Assembly of the State of Louisiana, of the year 1878, on which this prosecution is based, are not in violation of the amendments to the Constitution of the United States, articles 5 and 14; wherefore plaintiffs in error, Jos. Natal *et als.* (consolidated), pray that the judgment of the supreme court of the State of Louisiana be reversed and that there be judgment rendered in favor of plaintiffs in error, Joseph Natal *et al.*, and for general relief.

(Signed) BELDEN & AMBRUSTER, *Att'ys.*

23 UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, George W. Dupre, clerk of the supreme court of the State of Louisiana, holding sessions in the city of New Orleans, hereby certify the foregoing twenty-two pages to contain a true, correct, and complete transcript of the record of the proceedings had in this honorable court in a certain suit, wherein Joseph Natal *et als.* were defendants and The State of Louisiana was plaintiff, which said suit is now under the files of this court as No. 9935.

In testimony whereof I have hereunto set my hand and affixed the seal of this hon. court, at the city of New Orleans, this 6th day of October, A. D. 1887, and the 111th year of the Independence of the United States of America.

[Seal Supreme Court of the State of Louisiana.]

GEORGE W. DUPRE, *Clerk.*

24 UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, hereby certify that George W. Dupre is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of George W. Dupre to the within certificate is in the proper handwriting of him, the said clerk, and that due faith and credit are due all his official acts as such.

In testimony whereof I have hereunto set my hand and seal this 6th day of October (at the city of New Orleans), *and* 1887, and in the 111th year of the Independence of the United States of America.

[Seal Supreme Court of the State of Louisiana.]

E. BERMUDEZ,
Chief Justice.

25 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph Natal, Joseph Hug, Adam Gims, August Spraul, Timothe Rouche, J. M. Sabathe, F. Lamarque, A. Block, Dominique Rotje, and Thomas Fallon, appellants, and The State of Louisiana, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or

26 statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the ninth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

[Endorsed:] Supreme Court of Louisiana. Filed May 12, 1887 George W. Dupre, clerk.

27 The United States of America to the State of Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein Joseph Natal, Joseph Hug, Adam Gims, August Spraul, Timothe Rouche, J. M. Sabathe, F. Lamarque, A. Block, Dominique Rotje, and Thomas Fallon are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph B. Bradley, associate justice of the Supreme Court of the United States, this ninth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

JOSEPH P. BRADLEY,
Asso. Justice of Sup. C't U. S.

28 [Endorsed:] City of New Orleans, through its mayor. Supreme Court of Louisiana. Filed May 17, 1887. George W. Dupre, clerk.

Rec'd & refer'd to the city att'y, thro' the office of the city comp., May 12, '87, 3 p. m.

E. F. BOWER, *C. C.*,
Pr. R., *Ass't.*

On this twelfth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared Peter A. McIntyre before me, the subscriber, a qualified notary public in and for the parish of Orleans, State of Louisiana, duly commissioned & qualified, and makes oath that he delivered a true copy of the within citation to D. M. Kilpatrick, acting mayor of the city of New Orleans, at the mayor's office, in city hall, in the city of New Orleans, State of Louisiana, the mayor, J. V. Guellalle, being absent from the city & State.

P. A. McINTYRE.

Sworn to and subscribed the 12th May, A. D. 1887.

[Seal Andrew Hero, Jr., Notary Public.]

A. HERO, JR.,
Notary Public, 17 *Commercial Place, New Orleans.*

Received May 12, '87, and on 13th same month referred to city att'y.

E. A. WILLIAMS,
For Comptroller.

Endorsed on cover: Louisiana supreme court. No. 1271. Joseph Natal, Joseph Hug, Adam Gims, August Spraul, Timothé Rouche, J. M. Sabathe, F. Lamarque, A. Block, Dominique Rotje, and Thomas Fallon, plaintiffs in error, *vs.* The State of Louisiana. Filed October 21, 1887.

IN THE

Supreme Court of the United States.

Nos. 1271, 1272, 1273, 1274.

PETITION OF JOSEPH HUG *et als.*, PLAINTIFFS IN ERROR.

To the Honorable Judges of the Supreme Court of the United States, holding sessions at the City of Washington, District of Columbia:

The petitioners herein, Joseph Hug, Timothé Rouche, August Spraul, and Joseph Natal, residents of the City of New Orleans and State of Louisiana, and citizens of the State of Louisiana and the United States of America, represent to this honorable Court that they are plaintiffs in error in suits Nos. 1271, 1272, 1273, and 1274 on the docket of this honorable Court, entitled "The State of Louisiana *v.* Joseph Hug, Timothé Rouche, August Spraul, and Joseph Natal, separately and respectively. That in connection with said writs of error, bonds have been filed, and approved, and operate as supersedeas of further proceedings on execution of judgment or sentence of the lower Court, to whom writs of error were directed from this honorable Court. That service of writ of error has been made on the City of New Orleans, the defendant in error, as shown by return of service thereof on the mayor of said city in the record in each writ of error pending in this honorable Court, as aforesaid.

Your petitioners now represent, that under said writ of error, with bond as supersedeas, all filed with time to suspend further proceeding until hearing and decision in

this honorable Court, they were and are entitled to protection against the execution of said judgments and sentences until finally decided in this honorable Court.

Petitioners now represent that the City of New Orleans, through the mayor thereof, J. V. Guillotte, and one Henry Larquié, lessee of the public markets of the City of New Orleans, have, and still do in utter contempt of the authority of the Supreme Court of the United States in its orders granting said writs of error and approving bonds as supersedeas, flagrantly violate the same by executing said sentences or judgments by fine and imprisonment of petitioners. That further proceedings, as they are aware, have not only been suspended by reason of bond of supersedeas, but as matter of fact other large bond, suspensive in the character, have been furnished said city against any injury pending said writs of error, but that notwithstanding all these bonds and writs from this honorable Court, said mayor, J. V. Guillotte, and Henry Larquié, acting under the authority of said city, contemptuously and wantonly ignore the mandates of this honorable tribunal, by arbitrarily and constantly imprisoning them, notwithstanding the suspension of proceedings under said writs. They, therefore, represent that this honorable Court will still be treated contemptuously by them, and petitioners' rights ignored and their liberty taken from them, unless this honorable Court enforces obedience to its orders and jurisdiction by their prompt and speedy punishment for contempt of its authority and rights of petitioners thereunder.

Wherefore, after reading this petition to your honorable Court, and being thus, under oath, duly informed of the grave contempt of its authority committed by said abovenamed parties, they pray that the mayor of the City of New Orleans, J. V. Guillotte, and Henry Larquié, lessee and representative of said city, be attached and brought before this honorable Court at such day and hour as may be fixed by this honorable Court, and show cause, if any they can,

why they should not be punished for contempt of the authority of this honorable Court, in manner and form as the end of justice demands, and for general relief in the premises.

BELDEN & ARMBRUSTER,
Attorneys.

Personally came and appeared before me, the undersigned authority, Joseph Hug, Timothé Rouche, August Spraul, and Joseph Natal, who, under oath, say the allegations in the foregoing petition are true and correct.

JOSEPH HUG.
TIMOTHÉ ROUCHE.
AUGUST SPRAUL.
JO. NATAL.

Sworn to and subscribed before me this 3d of November, 1887.

C. M. ILSLEY,
Notary Public.

[SEAL.]

J. HALE SYPHER,
Attorney for Plaintiffs in Error.

Amended Petition.

To the Honorable the Judges of the
Supreme Court of the United States:

The amended petition of Joseph Hug, Timothé Rouche, August Spraul, and Joseph Natal, filed in proceedings for contempt, in suits Nos. 1271, 1272, 1273, and 1274 of petitioners on the docket of the Supreme Court of the United States, after reiterating allegations of original petition, represent that J. V. Guillotte, mayor of the City of New Orleans, and Henry Larquié, lessee of the public markets of the City of New Orleans, are guilty of contempt of the mandates and authority of this honorable Court, in manner and specifically as hereinafter alleged, and for the following reasons:

That is to say, writs of error were granted petitioners by Associate Justices Bradley and Harlan in the above-numbered writs of error, and on the same day of granting said writs of error said Associate Justices approved bonds to operate as supersedeas in each case above recited. That said writs of error, with bonds approved as aforesaid, to operate as supersedeas in cases, respectively, from the Supreme Court of the United States to the Supreme Court of Louisiana, were filed, respectively, in the clerk's office of the Supreme Court of Louisiana, to which tribunal they were directed and belong, on the 12th day of May, 1887, the 25th of July and the 6th day of August, 1887, and that service was made of said writs of error, with supersedeas, by the civil sheriff of the parish of Orleans, (being the proper officer for that purpose,) respectively, on the 17th day of May, 1887, and the 25th of July and the 20th of August, 1887, on the mayor of said City of New Orleans, J. V. Guillotte.

Petitioners represent that they had taken suspensive appeals in said cases from the Recorder's Court, being a municipal magistrate of said city, where they originated,

to the Supreme Court of Louisiana, and in so doing furnished large bonds therefor to suspend execution of sentence of said Municipal Court, and again, on writs of error from this honorable Court to the Supreme Court of the State of Louisiana, furnished bonds in each of the above-numbered writs of error, to operate as supersedeas therein, and which bonds, as supersedeas, were duly approved, respectively, as aforesaid, by Justices Harlan and Bradley, of this honorable Court; and that, by reason of said writs and supersedeas, the execution of judgment on which writs of error are based is suspended during the pendency in this honorable Court, and that said mayor of the City of New Orleans, J. V. Guillotte, is without right or authority in law or justice to execute said judgment, or prevent in any manner petitioners from carrying on their said business, which is the sale of meat.

Petitioners now represent that said mayor, J. V. Guillotte, notwithstanding said writs of error and supersedeas, and totally unmindful of the orders and mandates of this honorable Court and the rights of petitioners, and being with a desire to disregard this honorable Court and petitioners in its mandates and their rights, did, on the 25th day of August, 1887, sue out injunctions against petitioners, before the Civil District Court for the parish of Orleans, and by the terms of which injunctions petitioners were prevented from carrying on their said business. That the grounds on which said injunctions are based are the same law and city ordinance, the same defendants, and the same location of mercantile business, as that involved in said writs of error, being the same persons and same course of action in said injunctions, and based on the same law and city ordinance, identical in every particular with the cases involved in said writs of error.

Petitioners allege that in obtaining said injunctions said mayor has used said Civil District Court as a means by which to destroy petitioners' rights in the premises, and

to treat the orders and mandates of this honorable Court with contempt, by interposing said Civil District Court to carry out his purposes and designs. That copies of these injunctions accompany this petition, and show that they were contemptuously obtained long after services on said mayor of said writs of error and supersedeas, the dates of service as above given, and after written complaint made to said mayor, as shown by accompanying letter of attorney of petitioners to said mayor. That petitioners, believing that by reason of their said writs of error and supersedeas, judgment therein could not be executed, and that they had a right to carry on their said business, continued the same notwithstanding said injunctions, and for which, as shown by accompanying records, they were committed to prison. That by said method of injunctions said mayor well knew that, under the laws of Louisiana, they could not be set aside by petitioners giving bond, and that even on motion to dissolve, and should the same be dissolved by appeals and usual delays in the Courts of New Orleans, it could not be disposed of in a period of less than two years, and which was one of the principal reasons for using said Civil District Court to invade the exclusive jurisdiction of this honorable Court, and destroy petitioners' rights in the premises; that the issue between the City of New Orleans and petitioners is a civil question, involving simply and purely a question of civil rights. It is not an issue involving a question of crime, and, therefore, as a civil question, over which this honorable Court is seized of jurisdiction, the whole subject-matter is before this honorable Court to the exclusion of any other tribunal, and that said mayor has been, and now is, guilty of contempt, through and by the use of said Civil District Court, in obtaining said injunctions, and imprisoning petitioners and forcibly closing their business, through the sheriff of the parish of Orleans, as all of which is shown by accompanying records.

Petitioners further represent that Henry Larquié, lessee of the public markets of New Orleans, is also guilty of contempt by reason of his having employed counsel to obtain, with said mayor, said injunctions; that said counsel, employed by said Larquié, are "Blanc & Butler," who have signed petitions for injunctions as "counsel," being counsel for Larquié, and that said "Blanc & Butler," counsel for Larquié, drew the petitions for said injunctions, and conspired with said mayor, as attorneys of said Larquié, and said Larquié and said mayor, acting together, obtained said injunctions upon the affidavits to petitions of said mayor, who alone was authorized to apply therefor. Petitioners further represent that beside said contempt by injunctions, the said Henry Larquié had said mayor to detail for said Larquié one John Kenny, commissioned as a policeman, and under the pay of said Larquié, to close their places of business, by causing the arrest of petitioners and their imprisonment in more than twenty instances since said writs of error and supersedeas were granted and served on said mayor; that petitioners urged to said mayor the suspension of proceedings under said writs and supersedeas, but to no purpose, and they were imprisoned, notwithstanding the fact that the whole matter was under the sole control of said mayor, but who indorsed and approved the arbitrary acts of imprisonment by said Larquié, acting through his employee, John Kenny, the policeman, and his attorneys, Blanc & Butler; that said Larquié was and is well aware of said writs of error and supersedeas, and like said mayor, declares that he will disregard them as though they did not exist; that herewith are accompanied documents, complete as to violation and contempt by injunctions, and copies of charges on which arrests and imprisonments were made by said Larquié through John Kenny, his employee and agent, after examination of original and amended petitions and documents, papers in

record and sworn allegations of this petition, they pray as in original petition and for general relief.

BELDEN & ARMBRUSTER,
Attorneys.

J. HALE SYPHER,
Attorney for Plaintiffs in Error.

Personally came and appeared before me, the undersigned authority, Joseph Hug, August Spraul, Timothé Rouche, and Joseph Natal, who on oath say, that the facts and allegations of above and foregoing petition are true correct, and correct copies accompanying the same.

JOSEPH HUG.
AUGUST SPRAUL.
TIMOTHÉ ROUCHE.
JO. NATAL.

Sworn to and subscribed before me this 16th day of November, A. D. 1887.

[SEAL.]

C. M. ILSLEY,
Notary Public.

State of Louisiana
vs.
Joseph Hug.

No. , First Recorder's Court of the City of New Orleans.

The defendant herein, Joseph Hug, appears, through his undersigned counsel, in this honorable Court, and for answer as reasons for defense, and why this prosecution should be dismissed and he be hence discharged therefrom, alleges:

1st. That the ordinance No. 4798 of the City of New Orleans, in the year 1878, has been abrogated, annulled, and repealed, and is no longer in force, and especially sections 1 and 4 of said ordinance, upon which this prosecution is based; that is to say, said ordinance 4798 of 1878 was adopted as required by act No. 100 of the Legislature of the State of Louisiana of 1878, entitled "An act to regulate the private markets in the City of New Orleans, and for other purposes, being act No. thirty-one of the sessions of the general assembly for one thousand eight hundred and seventy-four, and to authorize the Council of the City of New Orleans to pass ordinances and make regulations for the government and regulation of private markets in said city;" which act has been abrogated, annulled, and repealed by virtue of the provisions and powers enumerated in act No. 20 of the general assembly, as the State of Louisiana, approved June 23d, 1882, entitled "An act to incorporate the City of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions — due public notice having been given in accordance with the requirements of Article 48 of the Constitution."

Defendant says that the City of New Orleans, a corpor-

ation of the State of Louisiana, existing under the Constitution of the State, of 1868, and the laws thereunder enacted, ceased to exist as such under the act No. 20 of 1882, above set forth; that the said city, under the Constitution of 1868, and the laws thereunder, is not the same City of New Orleans as incorporated under act No. 20, either as to territorial limits or intendment of law; that the said act of 1878, vesting in the City of New Orleans at said date the power to regulate the markets in said city then existing, has not been perpetuated but ignored and abrogated by the present act of incorporation by the Legislature of the State of Louisiana, and is, therefore, in so far as this prosecution is concerned, an attempt to invoke a prosecution and usurp authority under an act of the General Assembly of the State of Louisiana, and an ordinance of a City of New Orleans that have both ceased to exist and is in violation of constitutional and statutory law and the personal rights of your respondent in the premises.

That the said city ordinance under which defendant is prosecuted, as well as the act No. 100 of 1878, authorizing said ordinance, are inconsistent and in conflict with the provisions of act No. 20 of 1882 of the Legislature of the State of Louisiana incorporating the present City of New Orleans, and especially the seventh section thereof; that under the provisions of said act no reservation of power on the part of the City of New Orleans has been perpetuated under said act No. 100 of 1878, or said ordinance No. 4798 of the late City of New Orleans, by which their provisions can be carried into effect; that in truth and in fact and in law said law and said ordinance have been abrogated and repealed, and that at present there is no law or ordinance regulating the public and private markets of New Orleans, and that, therefore, this prosecution is a usurpation of authority not warranted by law and in total disregard of the rights of respondent.

That the Constitution of the State of Louisiana is violated

as regards the rights of respondent by reason of the attempted prosecution and deprivation of rights of respondent under an obsolete law and city ordinance.

Defendant further urges, that even if said act of the General Assembly of the State of Louisiana was still in force, with the ordinance of the late City of New Orleans No. 4798, still this prosecution could not be legally maintained against the defendant for those reasons; that said act No. 100 of 1878 was intended as a monopoly, which has been abrogated by article 248 and article 252 of the State Constitution of 1879, and as such is in violation of articles 5 and 14 of the Constitution of the United States; that defendant is deprived of liberty and property without due process of law, and under said monopoly and the intendment of said law is abridged in his privileges and remunities as a citizen of the United States, and deprived of his liberty and property under said monopoly, and is thereunder deprived of his equal exercise of the rights under the Constitution of the United States and the equal protection of its laws.

Respondent further urges that this honorable Court is without authority of law to punish in any manner or form your respondent for carrying on his said business in the locality when he is charged; that said ordinance repealed, as aforesaid, which assumes to confer power upon this honorable Court to punish by fine and imprisonment, is null and void, and in violation of law, for the reason that no authority has been given to this honorable Court to punish either by fine or imprisonment, and therefore the Legislature of the State of Louisiana, not having clothed this honorable Court with the power to punish in the premises, in any manner or form, it is without jurisdiction, and is usurping authority.

For these reasons, defendant urges that he should be discharged.

BELDEN & ARMBRUSTER, *Att'ys.*

To the Honorable the Judges of the
Civil District Court for the Parish of Orleans:

The petitioner, of the City of New Orleans, a municipal corporation created by the law of the State of Louisiana, and domiciled and doing business within the said State, respectfully showeth:

That Joseph Hug, a resident of the City of New Orleans, is carrying on and conducting the business known as a private market in the City of New Orleans, on corner First and Chippewa streets, and within a radius of six squares of a public market, namely, the public market known as the Sarraparn market.

Now, your petitioner shows that by act No. 100 of 1878, of the General Assembly, all private markets are prohibited within a radius of six squares of any public market in the City of New Orleans, and the said law and other acts of Legislature vested power in the municipality of New Orleans to regulate markets, public and private; and more especially is this done by the charter of said city and its amendments. That pursuant to said power and under the direction and authority of said act No. 100 of 1878, petitioner passed an ordinance relative to private markets, known as No. 4798 A. S., re-enacting the ordinance known as No. 4418 A. S., and that by said ordinance said Joseph Hug and others are bound and prohibited from establishing a private market within a radius of six squares of any public market.

Further, petitioner alleges that in defiance of said act of the Legislature No. 100 and of the said ordinance of the City of New Orleans, and in opposition to the authority of the municipal government of the City of New Orleans, the said Joseph Hug persists in conducting a private market at the locality aforesaid, and within the prohibited limit. That the said Joseph Hug has been several times arrested

and fined before a Recorder's Court of the City of New Orleans; that he has had fair and frequent hearings, and is without excuse, from ignorance or other cause, for his wilful, persistent and gross defiance of the legislative and municipal authorities. Your petitioner has an interest in maintaining said law and ordinance and the laws of the State, in the exercise of her police power—the duty to preserve the health of the City of New Orleans.

Now, petitioner avers that the said illegal persistence and acts of said Joseph Hug will endanger the authority of the city, tend to excite opposition to the laws, impede the exercise of the police and sanitary powers of the municipal government, and thereby injure and damage your petitioner, in rendering the public markets less productive, lessening the demands for stalls in said markets, and preventing the letting of a number thereof, and in destroying and impairing her police authority and exercise of public authority far in excess of $250,000. That by this open defiance of the law the said Joseph Hug encourages others to the like violation of the law, all of which injures and damages your petitioner far in excess of the sum of two thousand ($2,000) dollars. That petitioner is without remedy to prevent further loss and damages, resistance and violation of law, unless she be allowed an injunction.

Wherefore, petitioner prays that a writ of injunction issue to Joseph Hug, commanding, restraining and enjoining him from opening, maintaining or carrying on the private market on corner of First and Chippewa streets, or anywhere else in the City of New Orleans, within six squares of a public market; that citation issue to said Joseph Hug to appear and answer their petition, and that after due course of law, judgment be rendered in favor of petitioner and against the said , perpetuating said injunction and condemning him unto petitioner the sum $2,500 damages.

Further, petitioner prays for costs and for general relief.

(Signed) W. H. ROGERS,
City Attorney.

(Signed) BLANC & BUTLER,
Of Counsel.

Personally appeared J. V. Guillotte, Mayor of the City of New Orleans, who being first sworn, says that the fact and allegations in the foregoing petition are true.

Sworn to and subscribed before me this 24th day of August, 1887.

(Signed) J. V. GUILLOTTE,
Mayor.

(Signed) TH. BUISSON,
[L. S.] *Notary Public.*

Order.

Let a writ of injunction issue as within prayed for and according to law.

NEW ORLEANS, LA., , 1887.

(Signed) A. L. TISSOT, *Judge.*

A true copy:

(Signed) DON GORDAN, *Dy. Clerk.*

STATE OF LOUISIANA,
Civil District Court for the Parish of Orleans.

City of New Orleans
versus
Joseph Hug.

The 18th day of October, 1887. Present, the Honorable A. L. Tissot, Judge.

No. 21,068. On motion of W. H. Rogers, city attorney, and Blanc & Butler, of counsel for plaintiff, and on suggesting to the Court that , in open and flagrant disregard and violation of the injunction herein granted and served upon him, has continued from day to day since the day of , 1887, to conduct and carry on

the business of a private market, within six squares of a public market, viz., at corner of First and Chippewa streets in this city, which said private market is located within six squares of a public market known as Sarraparn.

That said defendant has since the date aforesaid been engaged daily in selling fresh meat and vegetables at said private market, and threatens to continue so doing, notwithstanding said injunction.

It is ordered that Joseph Hug show cause October 24th, 1887, at 11 A. M., why he should not be punished for contempt.

Extracts from the minutes:

H. MESSONIER, *Deputy Clerk.*

STATE OF LOUISIANA,

Civil District Court for the Parish of Orleans.

The State of Louisiana, to Thomas Duffy, Esq., Civil Sheriff of the Parish of Orleans, and the keeper of the Parish prison of New Orleans, greeting:

City of New Orleans
versus
Joseph Hug. } No. 21,068.

Whereas Joseph Hug has this day been adjudged, after due trial in open Court, to have been guilty of a contempt of this Hon. Div. A, Civil District Court for the Parish of Orleans, in that he has violated the injunction issued herein day of , 1887: Now, therefore, you, the civil sheriff of the Parish of Orleans, are hereby commanded, in the name of the State of Louisiana, and of the Civil District Court for the Parish of Orleans, to convey the body of Joseph Hug to the parish prison of the Parish of Orleans, and there deliver him to the keeper thereof, who is hereby authorized and commanded to imprison the said Joseph Hug for the term and space of ten days, and for so doing this shall be your warrant, or will as that of said parish prison.

And herein fail not under the penalty of the law.

Witness the Honorable A. L. Tissot, judge of our said Court, division H, this 24th day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

(Signed) A. L. TISSOT, *Judge.*

The State of Louisiana, to Joseph Hug, greeting:

City of New Orleans
versus
Joseph Hug. } No. 21,068.

You are hereby commanded, enjoined, and restrained, in the name of the State of Louisiana and of the Civil District Court for the Parish of Orleans, from opening, maintaining or carrying on the private market on corner of First and Chippewa streets, between streets, or anywhere else in the City of New Orleans, within six squares of a public market.

And you are so to remain enjoined and restrained until the further order of this Court.

Witness the Honorables A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, Albert Voorhies, judges of our said Court, this day of , in the year of our Lord one thousand eight hundred and eighty seven, and in the one hundred and eleventh year of the independence of the United States.

JAS. D. RANKIN, *Dy. Clerk.*

NEW ORLEANS, *July 27th*, 1887.

Hon J. V. GUILLOTTE,

Mayor of the City of New Orleans.

DEAR SIR: I find that it becomes my professional as well as individual duty, to address you in behalf of the following-named parties (private market proprietors), to wit, Joseph Hug, Joseph Natal, August Spraul, and Timothé Rouche.

The above-named parties have heretofore been arrested, tried, and fined before the Hon. Robert C. Davey, Recorder of the First District of the City of New Orleans, charged with the violation of City Ordinance 4798, prohibiting private markets within a certain radius from a public market; from sentences imposed in these cases (being fines of $25 each) appeals were taken to the Supreme Court of Louisiana, and that on hearing in said Supreme Court, the sentences of Judge Davey were affirmed. From the judgment by the Supreme Court of Louisiana the issues were taken by writ of error to the Supreme Court of the United States, where it is now pending for hearing and decision.

The questions presented by defense in these cases are serious, and, as we believe, well founded in law.

I desire to impress upon your mind the fact that in all of these cases bonds have been given in a very large sum in favor of the City of New Orleans, both in appeals from First Recorder's Court to Supreme Court of Louisiana, and from Supreme Court of Louisiana by writ of error to Supreme Court of the United States, to secure said city any damages that might possibly result upon a final judgment against the parties in the Supreme Court of the United States. Your attention is particularly directed to the fact that these various writs of error which have been served upon you as the executive head of the city government are accompanied in each case by supersedeas, being bond

in favor of said city to secure her against loss, and which bond, operating as a supersedeas, is duly approved and signed by Associate Justices of the Supreme Court of the United States, Bradley and Harlan, and now on file in the clerk's office of the Supreme Court of the State of Louisiana.

Thus, you will see by my statement, which is verified by the records of the Supreme Court of the State of Louisiana, that the question in its entirety, as to whether these parties have a right to carry on their private market business, is pending in the Supreme Court of the United States, with bonds in favor of the City of New Orleans more than sufficient to meet any damage that might result from a failure to maintain our defense in said high tribunal.

With this statement of facts as the ground of our complaint, we now inform you, that in the total disregard of our right in the premises of the parties named, that they are prevented from carrying on their business (as they certainly have a right to do) by affidavits and arrests made before Judge Davey of the First Recorder's Court of the city, and sheriff's deputies taking forcible possession of their place of business, and thereby preventing sales of their commodities.

We have reason to believe that these violations of our rights and the total disregard of the mandates of the Supreme Court of the United States are the acts of one Henry Larquié, lessee of the public markets of the City of New Orleans, who seems to arrogate to himself the right to disregard law and Courts of Justice, and to these citizens as though they were entirely without rights, and at his mercy. We further learn that he pretends that he can proceed as he chooses, by affidavits or otherwise, and that every affidavit or new act constitutes a new case, and has no connection with the cases pending on writ of error in the Supreme Court of the United States. Perhaps he has been advised that he has a right thus to act;

but, if so, I am sure that the advice given him is as erroneous as the advice previously given him that he could make *a grocery establishment* of the public markets on Sunday. Either position is as erroneous as unjust. We desire (in order that we may present the matter fully) to state that the violation of a city ordinance, where a question of right is involved, is a civil and not a criminal case; and, being a civil case, either party can appeal suspensively and stay further proceedings. You will find this elementary doctrine fully laid down in the recent case of the City of Kansas *v.* Clark, (Supreme Court of Missouri, vol. 5, new series), Southern Law Review, and also in one of our own decisions in Martin's Reports, where in a case for violation of city ordinance such as this, an appeal suspended further proceedings until the case was finally decided. In other words, the question of the validity of the city ordinance, and the rights of the defendants having been submitted to the Court for decision, and the defendants, having furnished the city with bond to cover any damage she may sustain, takes the whole question before the Supreme Court of the United States, and which cannot be again antagonized by dividing this civil question by a multiplicity of new affidavits. What use would be our writs of error, with bonds in favor of the city, if Mr. Larquié can destroy them by new affidavits, imprisonments, and closing places of business by deputies of the sheriff of the Parish of Orleans? The answer is plain, that our rights in Court would be an expensive farce, and Mr. Larquié would hold a position higher than the Supreme Court of the United States. Mr. Larquié was informed by Judge Billings that any violation of the supersedeas in the writs of error, would subject him to severe punishment at the hands of the Supreme Court of the United States.

Now, I call your attention to the fact that these violations of said writs of error are done in the name of the City

of New Orleans, and not in the name of Mr. Larquié, who is hiding behind the cover of the city's name. These parties are citizens well known for their honesty and industry, engaged in a business of itself lawful and right, and in localities where the inhabitants require these markets; a business indorsed by three-fourths of the inhabitants of this city as necessary and established by public demand, and wherein the most refined and sensitive nature could not urge that they interfere with the public health.

This being the case, and the city being in any event secured against loss by good and solvent bonds, equity as well as law dictates and requires that they should not be interrupted in their business pending their writ of error in the Supreme Court of the United States, for it is the vilest nonsense for the lessee to complain, if he and the city are secured by our bonds from loss. The numerous acts of oppression committed by said lessee against these parties, by imprisonment and otherwise, while their cases are pending in Court, have never been excelled under the most absolute form of government. As the executive head of the government of the City of New Orleans, we believe it to be your duty to interpose your authority by forcing obedience to the orders and authority of the Supreme Court of the United States over these cases, and to that end you see to it that no further interference be made against them in the conduct of their business, and that in order that no uncertainty surround the city in her duty to these citizens and litigants, you should give official notice to the municipal judges of the City of New Orleans, and your police officers, to do nothing in the premises calculated in any manner to interfere with their business, as herein set forth.

My long and friendly acquaintance with you, both personally and officially, with my personal knowledge of your disposition at all times to do that which is right, and know-

ing that much has been done in these matters of which you know nothing, has prompted me to send you this lengthy communication. I am sure that you will give it a careful consideration, and after so doing, will see that no further contempt is committed against the authority of the Supreme Court of the United States, and no further trampling upon their rights, and that we may be saved the trouble and mortification of urging obedience in the Supreme Court of the United States.

Resp'y, S. BELDEN, *Att'y.*

UNITED STATES SUPREME COURT.

Nos. 1271, 1272, 1273, and 1274.

PETITION OF

JOSEPH HUG ET AL., Plaintiffs in Error.

Filed November 7, 1887.

Amended Petition, filed November 21, 1887.

J. HALE SYPHER,
Attorney.

FILED.
MAR 30 1891
JAMES H. MCKENNEY
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Supreme Court of the United States.

OCTOBER TERM, 1890.

Nos. 271, 272, 273, 274.

JOSEPH NATAL, JOSEPH HUG, ADAM GIMS, AUGUST SPRAUL, TIMOTHY ROUCH, J. M. SABATHE, F. LAMARQUE, H. BLOCK, DOMINIQUE ROTJE, and THOMAS FALLON,
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BRIEF FOR PLAINTIFFS IN ERROR.

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McGILL & WALLACE PRESS,
WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

JOSEPH NATAL *et al.*
vs.
THE STATE OF LOUSIANA. } Nos. 271, 272, 273, 274.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

The very able brief, with the numerous exhibits thereunto attached, filed by Hon. Carleton Hunt, City Attorney, for defendant in error, has very materially reduced the labor which we had deemed necessary, before reading same, in order to present the case fully to this court. The facts therein contained, we admit, are very impartially stated and in the main features we believe to be correct. We will even go so far on our part as to abandon all argument in regard to Article V of the Amendment of the Constitution of the United States, as we are perfectly willing to admit, under the decisions of this court, that the first ten articles of the amendments of the Constitution are only binding on the Government of the United States and do not affect the action of the separate States. But in thus freely giving up our outworks, we will fall back to the citadel, in which we maintain we are so

strongly entrenched as to be deemed well nigh impregnable. Need we state that this position which we take will be under section I of Article XIV of the Amendments of the Constitution, and which our opponent has barely touched in the brief submitted for the other side? We maintain that plaintiffs in error have the right to the decision of the court in their favor under the provisions of such section:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We beg to call the attention of the court to the fact that, in the very initiative of the proceedings against plaintiffs in error, they were condemned by judgment of fine and imprisonment in the First Recorder's Court of the City of New Orleans, thereby depriving them of the privilege of a trial by jury, and which is clearly a violation of the first section of Article XIV of the Amendments of the Constitution. We are well aware that this court decided in the case of New Orleans Water-works Company *v.* Louisiana Sugar Refining Company, 125 U. S., 18, in which Mr. Justice Gray delivered the opinion of the court and stated as follows: "The grounds upon which the Supreme Court of Louisiana gave judgment for the defendants appear by its opinion, which under the practice of that State is strictly part of the record, and has always so been considered by this court on writs of error," and that Mr. Chief-Justice Bermudoz, in delivering the opinion of the Supreme Court of the State of Louisiana in our case, said: "We consider that these and other objections to the constitutionality or legality of the ordinance in question and others similar to it have been already considered and judicially determined in

favor of the regulation" (page 23 of the Record); still we do not consider that we are estopped from setting up this defense, which was clearly made in the Recorder's Court (see page 3 of the Record), though the point was ignored, apparently, when carried by appeal to the upper court. As for the grounds on which this judgment of the Recorder's Court is clearly unconstitutional, we think that the reasoning is conclusive as contained in the opinion of Mr. Justice Blatchford, rendered in 7 Ben., 1, decided by him in 1873 as judge of the U. S. District Court for the Southern District of New York. The particular section of the ordinance which we think is clearly unconstitutional is as follows:

"That no private market shall be permitted within a radius of six blocks of any public market of the city, as per plan on file in the office of the administrator of commerce, designating and specifying the same and making part of this ordinance, and it shall be the duty of the chief of police, under the direction of the administrator of commerce, to cause any private market opened in violation of the provisions of this section to be closed; and any person opening a private market in violation of the provisions of this section, and within the said prohibited distance, shall be liable to a fine of twenty-five dollars for each and every offense; said fine to be imposed and collected by the recorder of the district in which said private market may be situated. In default of the payment of each and every fine so imposed the person so defaulting shall be subject to imprisonment for a term not to exceed thirty days or less than five days." (Ordinance 4798 A. S., Sec. 4.)

The authority under which his ordinance was passed is contained section 3, act of the Legislature of the State of Louisiana, approved March 15, 1878:

"*Be it further enacted, etc.,* That the City Council may prescribe by ordinance the manner in which such private markets shall be kept, the portion of the city in which they shall be located, and the distance which they

will be removed from the public markets, and shall have power to provide for the enforcement of said ordinances: *Provided*, No private market shall be established within a radius of six (6) squares of any public market."

I.

We proceed now to the recent rulings of this court in regard to the point in issue, as stated above.

The case of Minnesota *v.* Barber, 136 U. S., 313, decided during the past term of this court, we consider as a complete vindication of the position which we assume, and presenting a thorough refutation of the grounds which have been taken by the learned counsel representing the city of New Orleans as maintaining the legislation on the subject as being within the police power of the State. In the above case Mr. Justice Harlan, rendering the opinion of the court, stated as follows:

"The presumption that this statute was enacted in good faith for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has often been announced by this court."

We deny most emphatically that the provision contained in sec. 3, act of the legislature, approved March 15, 1878, "No private market shall be established within six (6) squares of any public market," has any application to the police power. This proviso was simply to increase the value of the franchise farmed out to the

lessee of the public markets, one Henry Larche, who thereby was enabled to use such a lease as means of extortion on vendors of provisions coming from the adjacent country contiguous to the city, as also to citizens of the other States of the Union, and foreign subjects who frequented the city of New Orleans as a mart in which to dispose of such produce as could be only sold to profit in the open markets of a city.

In this case the city of New Orleans has gone into partnership with the lessee of the public markets and has used its grant of municipal power to enhance the profits of such partnership in such a manner as virtually to prohibit the citizens of the State of Louisiana and the other States of the Union, as also the subjects of foreign governments, from selling all provisions of a perishable nature except at the behest and by submitting to the demands of such unlawful partnership. The city of New Orleans, except an insignificant suburb, forms a crescent on the left bank of the Mississippi River, stretching some sixteen or seventeen miles in length and from three-quarters to a mile in breadth, and the number of public markets, with the prohibition of the six adjoining squares, virtually takes in the whole territory and gives a monopoly to the lessees of stalls in the public markets of the business of selling meats and fresh vegetables in that city. That such law was intended as a prohibition is easily discerned when the fact of the diminution of the prohibited distance, from a radius of twelve blocks to six blocks, is taken into consideration. The increase of the number of public markets rendered it unnecessary to keep up the prohibition at the former figure, so the law was amended so as to take in the latter number and still virtually continue the monopoly. When we remember that the most important of these public markets are situate on the public levee or adjacent thereto, we can easily conceive the oppression they exercised on the foreign and

interstate commerce in articles of daily consumption brought to the wharves of the city, as the perishable nature of the articles in question and the high prices of drayage, with the corresponding danger of delay, forces the owners to sell at to the lessees of the public markets almost at any price dictated by such extortioners.

In this connection we would beg to call the attention of the court to the list of cases given by Mr. Justice Bradley, in rendering the opinion in Leloup *v.* Port of Mobile, 127 U. S., 648, treating on burdens of commerce of like character as portrayed above.

Counsel for defendant in error lays great stress on the necessity of prohibiting the opening of private markets within a radius of six blocks of the public markets, owing to sanitary reasons for the prevention of epidemics to which New Orleans is peculiarly liable. The history of the law contradicts such hypothesis. Before the act of March 15, 1878, was passed the prohibition was within a radius of twelve squares. Now, has the danger of epidemics so diminished that the prohibited radius could be decreased by the later law to so great a degree? The idea is preposterous, and the true reason of the change in the law is that given as above, and has no connection with anticipated danger of epidemics. Besides, the very spirit and essence of all sanitary laws should be uniformity, and the nature of such prohibition contradicts the fundamental principle. From the peculiar configuration of the city of New Orleans, as previously explained, being built in the form of a crescent, there could not be a more indefinite standard of distance than that prescribed in such prohibition. Taking each public market as the starting point to measure the distance of such prohibition, we are certain that the line to each of the thirty-two points of the compass would be different, nor would any measurements of two different public markets be the same. The absurdity of the posi-

tion thus taken by defendant in error is too manifest to need further argument.

There is another feature in this case which presents the city of New Orleans in a most invidious light. The ground upon which many of the public markets of the city have been built was originally donated for such purpose by the former proprietors. It is but a poor return for such generosity to depreciate the value of the adjacent property now owned by their descendants, by making the prohibition in question. Truly, my Lord Coke's saying, that corporations have no souls, is well exemplified in this action of ingratitude of a modern municipal corporation toward the descendants of their former benefactor.

That the right of transporting to and selling in the city of New Orleans the products of the different States of the Union by the citizens thereof, is guaranteed to them by Amendment XIV of the Constitution, and that the Act of the Legislature of the State of Louisiania, approved March 15, 1878, and the ordinances of the city of New Orleans, passed in pursuance thereof, abridge the privileges of citizens of the United States in compelling them to sell such products in the public markets, owned by the said city and worked in partnership with their lessee.

That consequently the judgment of the Supreme Court of the State of Louisiana, declaring said act of the Legislature and ordinances of the city of New Orleans as not contravening the provisions of Article XIV of the Constitution of the United States, is manifest error and should be reversed by this honorable court.

Respectfully submitted.

J. Hale Sypher,
West Steever,
Attorneys for Plaintiffs in Error.

Office Supreme Court
FILED.
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Supreme Court of the United States.

OCTOBER TERM, 1890.

Nos. 271, 272, 273, 274.

JOSEPH NATAL, JOSEPH HUG, ADAM GIMS, AUGUST SPRAUL, TIMOTHÉ ROUCH, J. M. SABATHE, F. LAMARQUE, H. BLOCK, DOMINIQUE ROTJE, AND THOMAS FALLON, PLAINTIFFS IN ERROR,

versus

THE STATE OF LOUISIANA.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

CARLETON HUNT,
City Attorney.

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Supreme Court of the United States.

OCTOBER TERM, 1890.

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versus

THE STATE OF LOUISIANA.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

In the year 1878, the General Assembly of the State of Louisiana adopted, and the Governor approved, Act No. 100 of the session of that year. The Act regulated private markets in the City of New Orleans, and authorized the City Council to pass ordinances and make regulations for the government of such markets, provided they should not be established within a radius of six squares of any public market. See Exhibit A, annexed hereto.

In conformity with this statute the Council of the City of New Orleans on the 17th day of December, 1878, adopted Ordinance No. 4798, administration series. (See Appendix, Exhibit B.) to give effect to Act No. 100.

The defendants, Joseph Natal and others, having been prosecuted before the First Recorder's Court of the City of New Orleans, for carrying on the business of a private market within a radius of six blocks of a public market, in violation of Section 4 of the Ordinance, were sentenced to pay a fine, and in default of payment of the fine imposed, to imprisonment. Appeals were thereupon taken to the State Supreme Court, and that Court having affirmed the judgment of the Recorder's Court, the case now comes before this Court on writs of error directed to the Supreme Court of the State of Louisiana at the instance of defendants.

See Appendix, Exhibit C, for judgment of Supreme Court of Louisiana.

On the trial in the Recorder's Court, the following plea in bar was filed by each defendant:

"The defendant herein appears, through his undersigned counsel, in this Honorable Court, and, for answer, as reasons for defence, and why this prosecution should be dismissed and he be hence discharged therefrom, alleges:

"1. That the ordinance No. 4798 of the City of New Orleans in the year 1878 has been abrogated, annulled and repealed, and is no longer in force, and especially Sections 1 and 4 of said ordinance, upon which this prosecution is based—that is to say, said Ordinance 4798 of 1878 was adopted, as required by act No. 100 of the Legislature of the State of Louisiana of 1878, entitled: 'An act to regulate the private markets in the City of New Orleans, and for other purposes, being act number thirty-one of the General Assembly for one thousand eight hundred and seventy-four, and to authorize the council of the

City of New Orleans to pass ordinances and make regulations for the government and regulation of private markets in said city,' which act has been abrogated, annulled and repealed by virtue of the provisions and powers enumerated in act No. 20 of the General Assembly of the State of Louisiana, approved June 23, 1882, entitled: 'An act to incorporate the City of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions, due public notice having been given in accordance with the requirements of Article 48 of the Constitution.'

"Defendant says, that the City of New Orleans, a corporation of the State of Louisiana, existing under the Constitution of the State of 1868 and the laws thereunder enacted, ceased to exist as such under the Act No. 20 of 1882, above set forth; that the said City under the constitution of 1868 and the laws thereunder is not the same City of New Orleans as incorporated under Act No. 20 either as to territorial limits or intendment of law; that the said Act of 1878 vesting in the City of New Orleans at said date the power to regulate the markets in said City then existing has not been perpetuated, but ignored and abrogated by the present act of incorporation by the Legislature of the State of Louisiana, and is, therefore, in so far as this prosecution is concerned, an attempt to invoke a prosecution and usurp authority under an act of the General Assembly of the State of Louisiana and an ordinance of a City of New Orleans that have both ceased to exist, and is in violation of the constitution and statutory law, and the personal rights of your respondent in the premises.

"That the said city ordinance under which defendant is prosecuted, as well as the Act No. 100, of 1878, authorizing said ordinance, are inconsistent and in conflict with the provisions of Act No. 20 of 1882, of the Legislature of the State of Louisiana, incorporating the present City

of New Orleans, and especially the seventh section thereof; that under the provisions of the said Act no reservation of power on the part of the City of New Orleans has been perpetuated under said Act No. 100, of 1878, or said Ordinance No. 4798 of the late City of New Orleans, by which their provisions can be carried into effect; that in truth and in fact, and in law, said law, and said ordinance have been abrogated and repealed, and that at present there is no law or ordinance regulating the public and private markets of New Orleans, and that therefore this prosecution is an usurpation of authority not warranted by law and in total disregard of the rights of respondent.

"That the Constitution of the State of Louisiana is violated as regards the rights of respondent by reason of the attempted prosecution and deprivation of rights of respondent under an obsolete law and city ordinance.

" Defendant further pleads, that even if said Act of the General Assembly of the State of Louisiana was still in force with the ordinance of the late City of New Orleans, No. 4798, still this prosecution could not be legally maintained against the defendant for these reasons; that said Act No. 100 of 1878 was intended as a monopoly, which has been abrogated by Article 248 and Article 252 of the State Constitution of 1879, and as such is in violation of Articles 5 and 14 of the Constitution of the United States, in this, that defendant is deprived of liberty and property without due process of law, and under such monopoly and the intendment of said law, is abridged in his privileges and immunities as a citizen of the United States, and deprived of his liberty and property under said monopoly and is thereunder deprived of his equal exercise of rights under the Constitution of the United States and the equal protection of its laws.

" Respondent further urges that this Honorable Court is without authority of law to punish, in any manner or form,

your respondent for carrying on his said business in the locality where he is charged; that said ordinance, repealed as aforesaid, which assumes to confer power upon this Honorable Court to punish by fine or imprisonment, is null and void and in violation of law, for the reason that no authority has been given to this honorable court to punish, either by fine or imprisonment, and therefore the Legislature of the State of Louisiana, not having clothed this Honorable Court with the power to punish in the premises in any manner or form, it is without jurisdiction and usurping authority.

"For these reasons defendant urges that he should be dismissed." Record, p. 1.

The plaintiffs in error, on the 6th day of October, 1887, subsequent to the granting of the writ of error, proceeded to file the following assignment of errors *in the Supreme Court of the State:*

Defendant herein assigns as error, and as a reason why the judgment of the Supreme Court of the State of Louisiana in the above entitled case should be reversed, and judgment rendered in defendant's favor on writ of error (1) that the Court erred in holding, that the law and ordinance of the State of Louisiana and City of New Orleans on which this prosecution is based, have not been repealed by Act No. 20 of the General Assembly of Louisiana of 1882 incorporating the City of New Orleans; (2) the court erred in decreeing that the city ordinance of the City of New Orleans, No. 4798, and Act No. 100 of the General Assembly of the State of Louisiana, of the year 1878, on which this prosecution is based, are not in violation of the amendments to the Constitution of the United States, Articles 5 and 14. Wherefore, plaintiffs in error, Jos. Natal *et al.*, prayed that the judgment of the Supreme Court of the State of Louisiana be reversed, and that there be judgment rendered in their favor and for general relief.

ARGUMENT.

Under the foregoing pleas this Court is called upon by plaintiffs in error to decide the following questions:

First—Have Act No. 100 of the General Assembly of Louisiana of the year 1878 and Ordinance No. 4798, administration series, of the City of New Orleans, relative to private markets in the City of New Orleans, been repealed by Act No. 20 of the General Assembly of Louisiana of 1882, incorporating the City New Orleans?

Second—Are the city ordinance of the City of New Orleans No. 4798 and Act No. 100 of the General Assembly of the State of Louisiana of the year 1878, on which this prosecution is based, null and void, as violative of the amendments to the Constitution of the United States, Articles 5 and 14, and as depriving the plaintiffs in error of liberty and property without due process of law and of the equal exercise of rights under the Constitution of the United States, and of the equal protection of its laws?

I.

The contention of plaintiffs in error is, that Act No. 100 of 1878, and the Ordinance No. 4798, A. S., both of which relate to private markets in the City of New Orleans, have been repealed by the Act No. 20 of 1882, known as the Charter of the City of New Orleans, and that in consequence, the prosecutions thereunder are *ultra vires* and a usurpation of authority.

The Act of 1878 is a grant of power by the Legislature of the State of Louisiana to the municipality of New Orleans, authorizing the proper authorities to exercise the police power of controlling the private markets, established within the limits of the City of New Orleans.

The first section of the act repeals a preëxisting act of the Legislature on the same subject matter.

By the second section it is enacted that "the City Coun-

cil of the City of New Orleans be and they are hereby authorized and empowered to make such arrangements and pass such ordinances for the government and regulation of private markets in the City of New Orleans as they in their discretion may deem proper, and that they be vested with full power to provide for the enforcement of their said ordinances; *provided*, the City Council shall not have the power to prohibit the existence of private markets under proper regulations."

The third section provides: "That the said City Council may prescribe by ordinance the manner in which such private markets shall be kept, the portion of the city in which they shall be located, and the distance which they shall be removed from the public markets, and shall have power to provide for the enforcement of said ordinances; *provided*, no private market shall be established within a *radius* of six (6) squares of any public market."

The portion of Act 20 of the Legislature of 1882 bearing on markets is to be found in Section 7 of that Act: (See appendix, Exhibit D).

"The council shall have power and it shall be their duty to pass such ordinances and to see to their faithful execution as may be necessary and proper; * * (2) to maintain its cleanliness, and health, and to this end * * (b) to provide for the inspection and cleanliness of all vaults, privies, yards, pools, markets, cemeteries; * * * "

It is submitted that there is, clearly, nothing in the section quoted above which sustains the claim advanced by plaintiffs in error, of a repeal of the Act of 1878. It becomes necessary therefore to inspect other portions of the Act of 1882 to ascertain whether the act in question has been repealed elsewhere than in Sec. 7. The repealing clause of the Act of 1882 is in these words (See appendix C): "Section 78. All laws in conflict, inconsistent with, or contrary to the provisions of this act, be and the same are hereby repealed." Now, then, the enquiry arises

whether there is anything in the act of 1878 which is in conflict or inconsistent with, or contrary to the provisions of the act of 1882?

The act of 1878 as already stated, authorizes the council to pass ordinances for the government and regulation of private markets. Section 7 of Act 20 of 1882 makes it the duty of the council to pass such ordinances, and to see to their faithful execution, as may be necessary and proper to maintain the cleanliness and health of the City of New Orleans, and to this end to provide among other things for the inspection and cleanliness of markets.

Special provision is made by the Act of 1878 for private markets, while the Act of 1882 directs attention to all markets in the city whatsoever.

Properly speaking the Act of 1878 is a special act. The Act of 1882 on the other hand is of a general character, and includes within its scope, both private and public markets. As is often the case in like circumstances, the two acts do not at all conflict. On the contrary, they may not only stand together, but evidently do actually consist and simply show vigilance in the exercise of the police power in New Orleans on the subject of markets. The court will note, moreover, that by Section 28 of the Act of 1882, commonly known as the present charter of New Orleans, all rights to which the city formerly laid claim under previous charters, are preserved for it and maintained. (Appendix C.)

The case at bar, then, is much stronger than that put by Judge Dillon, in his work on *Municipal Corporations*, 3d Ed., *Section 85*. He says: "Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act and under its former name, there being no express repeal."

The same learned writer at *Section 171*, continues: "The name of an incorporated place may be changed, its boundaries enlarged or diminished, and its mode of government altered, and yet the corporation *not be dissolved, but in law remain the same.*"

Again, so *Section 172:* "Accordingly, the substitution of a new municipal charter in the place of a previous charter, or at a change in such a charter in wholeor in part, where substantially the same territory and the same inhabitants are concerned, will not be presumed to be the creation of a new corporation, but the assumption by the old one of new powers and privileges." * * *

The decisions rendered by this Court in *Girard vs. Philadelphia*, 7 Wall., p. 1; and *Broughton vs. Pensacola*, 93 U. S., establish these to be the correct views.

In *Mobile v. Watson*, 116 U. S. 300, the court said: "Where the Legislature of a State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new. In illustration and support of this proposition, the following cases are in point: * * *

"In *O'Connor vs. Memphis* 6 Lea, 730, the Supreme Court of Tennessee say that—'Neither the repeal of the

charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity, or succession of the corporation if the people and territory reincorporated constitute an integral part of the corporation abolisbed * * * The corporators and the territtory are the essential constituents of the corporation, and its rights and liabilities naturally adhere to them.' "

The foregoing remarks and citations have been made altogether out of due submission. The decision herein of the Supreme Court of Louisiana, as already represented, determined Ordinance 4798 of the City of New Orleans, whereunder plaintiffs in error were tried and sentenced, to be unrepealed by Act 20 of the Acts of 1882, and, therefore, to be in full force and effect.* This court will, it is believed, under repeated adjudications of its own, accept the decision in question as binding, it being a construction of the State law of Louisiana by the highest court of that State.

Quimby vs. Boyd, 128 U. S. Rep. 488.

DeSaussure vs. Gaillard, 127 U. S. Rep. 216.

Murray vs. Charleston, 96 U. S. Rep. 432.

United States vs. Thompson et al., 93 U. S. Rep. 586.

New York Life Insurance Co. vs. Hendren, 92 U. S. 286.

II.

Error to the decision of the Supreme Court of Louisisana is further assigned, on the ground, that the Court decided City Ordinance No. 4798 and Act No. 100 of the General Assembly of the State of Louisiana of the year 1878, on which the prosecutions herein are based, are not in violation of the amendments to the Constitution of the United States, Articles 5 and 14; Pllaintiffs in error contend that they are deprived of liberty and property without due process of law; that Act 100 was in-

State of La. vs. Natal. Exhibit C.

tended as a monopoly; and that they are deprived thereunder of the equal exercise of rights under the Constitution of the United States and of the equal protection of its laws.

Plaintiffs do not complain that they are prohibited from following a lawful occupation except in this, by the restriction imposed by the law they can not carry on their calling of market men within six squares of a public market.

It has been so frequently held by this Court that the prohibitions in the fifth article of the amendment to the Constitution of the United States are exclusively restrictions upon the federalpowers to prevent interference with the rights of States and their citizens, that a mere reference to the authorities will serve to establish that the amendment in question has no application at all to the instant case: *Barron vs. Baltimore*, 7 Peters, 243; *Livingston vs. Moore*, 7 Peters, 479; *Fox vs. Ohio*, 5 Howard, 410; *Twitchell vs. Commonwealth*, 7 Wallace, 321; *Fertilizing Co. vs. Hyde Park*, 97 *U. S.*, 659.

The objection, that the effect of the law and of ordinance No. 4798 is to establish a monopoly, if sustained by the facts of the case can not avail plaintiff in error. In the *Slaughter House cases*, 16 Wallace, 36, this Court, after considering all the arguments against the granting of privileges amounting to monopolies, recognized the authority of State Legislatures to grant exclusive rights when they are necessary and proper to effectuate a purpose which has in view the public good. At p. 61, the Court say: "The wisdom of the monopoly granted by the Legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to

destroy the business of the butcher, or seriously interfere with its pursuit."

In the second section of Act 100 authorizing the City Council to regulate private markets, while care is taken by the legislator to protect the private marketmen by means of the proviso, that "the City Council shall not have the power to prohibit the existence of private markets under proper regulations:" by the next section of the same act the interests of the public likewise are carefully conserved as follows: "That the said City Council may prescribe, by ordinance, the manner in which such private markets shall be kept, the portion of the city in which they shall be located, and the distance which they shall be removed from the public markets, and shall have power to provide for the enforcement of said ordinances; *provided*, no private market shall be established within a radius of six (6) squares of any public market."

Considering the character and the functions of the Council, the guarded language of Act No. 100, and the evident purpose thereof to protect the public health, it is submitted, that the act is clearly nothing more than a very usual exercise of the police power of the State. The City Council evidently so understood it, as Ordinance itself No. 4798 proclaims. The provision of the third section of Act No. 100, empowering the Council to prescribe, by ordinance, the manner in which private markets shall be kept, the portion of the city in which they shall be located, and the distance which they shall be removed from the public markets, was, it may be assumed beyond serious doubt, also adopted in the interest of proper police. Every line in the ordinance 4798 follows closely the provisions of Act No. 100.

It is familiar knowledge that the regulation and control of markets has been exercised as a part of the police power of government, both in this country and in England, time out of mind, and that it has been constantly sus-

tained by the Courts. *Nightingale, petitioner*, 11 Pickering 168; *Bush vs. Seabury*, 8 Johns. (Supreme Court of Judicature, N. Y.) 418.

Chancellor Kent (13 Ed. of Holmes), vol. 2, Marg. p. 340, lays down the law as follows:

"Though property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives or health, or peace or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community."

Cooley on Constitutional Limitations 5 Ed., p. 743, says:

"So the most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous; and rules for the conduct of the most necessary and common occupations are prescribed when from their nature they afford peculiar opportunity for imposition and fraud. Cities commonly provide markets where provisions may be exposed for sale; and these are subjected to careful regulations, and furnished with official inspectors to whom every dealer may be required to exhibit his stock."

In *Beer Co. vs. Massachusetts*, 97 U. S., 33, the Supreme Court of Massachusetts say: "Whatever differences of

opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."

In the State of Louisiana, owing to peculiarities of climate and of soil, and to the frequent ravages of epidemic yellow fever, no little consideration has been given both by the Legislature and by the Courts to the subject matter under examination.

In *Milne vs. Davidson*, 5 Martin, N. S., 414, the Supreme Court of Louisiana says: "The police of cities require many regulations which grow out of their situation, their climates and their population; and many things which would not amount to a nuisance at common law might be hurtful here. An illustration of this may be found in the general recourse to quarantine regulations in warm climates, and the rare resort to them in cold ones. In a city like ours, where a dreadful epidemic, frequently returning, checks its growth, and occasions a great mortality among its citizens, too much care can not be taken to remove the causes which give rise to it. We have no doubt that the spirit and intention of the act of the Legislature was (as its language indicates) that an extensive discretion should be vested in the City Council. A much stronger case than that now before us must be presented to induce this court to interfere, and say that regulations, having for their object public health, were beyond their power, because they are contrary to our ideas of expediency."

In *Morano vs. Mayor*, 2 La. 219, the same Court says:

"In establishing markets they (the City Council) designate certain spots or places for the sale of certain articles of provision; in doing so, they facilitate the people in the purchase of provisions of first

necessity, by confining the sale of them to particular places and hours of the day, and they facilitate the inspection of provisions; and by the hire of stalls they raise money to defray the expenses of building market houses and pay the salaries of officers they appoint to prevent the sale of unsound provisions, and they have an undoubted right to prevent the violation of ordinances they may pass in establishing markets.

In *First Municipality, vs. Cutting* 4 La. An. 336, the Court says: "This power is vested by positive law in the Mayor and Council of each municipality, upon whom rests the responsibility of the peace, comfort and good order of the assemblages collected at those great thoroughfares." * * *

"It is contended that the corporation has no right to prohibit the sale of groceries in the public markets. The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police. See *Blackstone's Com.*, vol. p. 274, *Domat Droit Public*, lib. 1, sec. 3.

In City vs. Stafford, 27 La, An. 419, the Court says: "We pass now to the consideration of the most important question raised in this controversy. Has the Legislature the power to make the regulation which it has made by this act of 26th February, 1874, declaring that private markets shall not be established, continued, or kept open within twelve squares of a public market? This question, we think, must be answered in the affirmative. And the power arises from the nature of things, and is what is termed a police power. It springs from the great principle, *salus populi suprema est lex*. There is in the defendant's case no room for any well grounded complaint of the violation of a vested private right, for the privilege, if he really possessed it, of keeping a private market, was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate

the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity. By way of illustrating this necessarily existing power to regulate the number, location and management of markets, take the City of New Orleans, in a warm climate, located in a low district of country, surrounded by marshes and swamps, which, in the hot season, under favorable conditions, envelops its large population in a malarious atmosphere. Under such circumstances the danger of epidemics becomes imminent. It behooves the city authorities at such periods to be on the alert to obviate local causes of disease within the limits of the city. Among such causes the decay of animal and vegetable matter is a prominent one. The markets, therefore, must on that account be strictly attended to, and such measures adopted in regard to them as, in the judgment of the proper authorities, the public health may require. Suppose, under such a condition of things, it should be found necessary as a sanitary regulation to reduce the number of markets, to abolish some of them, and thereby avoid their becoming causes of disease. Suppose the lessee of a public market and the keeper of a private market should find the markets under their control abolished, closed or suspended from considerations of public security and benefit, before the expiration of the time for which their licenses were to continue; could they be sustained by law in a demand to be permitted to continue and keep open the markets they had charge of, on the pretence that they had a vested right to keep them open? Surely not. Their private benefit and advantage would have to yield to the public advantage. It would be a perversion of the principles of organized society and of regulated liberty to permit an individual to continue a business or occupation endangering the public health in order that he might derive profit from such occupation. We presume it will not be denied that under circumstances of peril and

emergency the law maker would have the right to abolish or suspend an occupation imperiling the public safety. This power is inherent in him. He may exercise it prospectively for prevention as well as *pro re nata* for immediate effect. It is within his discretion when to exercise this power, and persons under license to pursue such occupations as may, in the public need and interest, be affected by the exercise of the police power, embark in those occupations subject to the disadvantages which may result from a legal exercise of that power. The act of the General Assembly of 26th February, 1874, entitled 'An act to regulate the private markets in the City of New Orleans, and for other purposes,' does not violate or infringe any vested right. It is not unconstitutional."

Further exposition of the case is evidently quite unnecessary.

The judgment of the Supreme Court of Louisiana being correct ought now to be affirmed.

Respectfully submitted,

CARLETON HUNT,
City Attorney.

APPENDIX.

EXHIBIT A.

No. 100.] AN ACT

To repeal an act entitled "An Act to regulate the private markets in the City of New Orleans, and for other purposes, being Act No. thirty-one of the session of the General Assembly for one thousand eight hundred and seventy-four, and to authorize the Council of the City of New Orleans to pass ordinances and make regulations for the government and regulation of private markets in said city."

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That Act number thirty-one of the General Assembly of one thousand eight hundred and seventy-four, entitled "An Act to regulate the private markets in the City of New Orleans, and for other purposes," be and the same is hereby repealed.

Sec. 2. *Be it further enacted, etc.*, That the City Council of the City of New Orleans be and they are hereby authorized and empowered to make such arrangements and pass such ordinances for the government and regulation of private markets in the City of New Orleans as they in their discretion may deem proper, and that they be vested with full power to provide for the enforcement of their said ordinances; *provided*, the City Council shall not have the power to prohibit the existence of private markets under proper regulations.

Sec. 3. *Be it further enacted, etc.*, That the said City Council may prescribe by ordinance the manner in which

such private markets shall be kept, the portion of the city in which they shall be located, and the distance which they shall be removed from the public markets, and shall have power to provide for the enforcement of said ordinances; *provided*, no private market shall be established within a radius of six (6) squares of any public market.

Sec. 4. *Be it further enacted, etc.*, That all laws or parts of laws contrary to, or inconsistent herewith, be and the same are hereby repealed.

[Signed] LOUIS BUSH,
Speaker of the House of Representatives.

[Signed] LOUIS A. WILTZ,
Lieutenant Governor, and President of the Senate.

Approved March 15, 1878.

[Signed] FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy:

WILL. A. STRONG,
Secretary of State.

EXHIBIT B.

ORDINANCE 4798, A. S.

1. That private markets for the sale of meats, fish, vegetables, fruit and other comestibles may be opened and kept in any portton of the City of New Orleans, not within a radius of six squares of any public market of said city: *provided* the proprietor of said market pays the license provided therefor, and otherwise complies with the provisions of this ordinance and other ordinances relating to the same subject matter.

2. That all private markets shall be kept in the lower story of the building in which they are opened.

They shall be thoroughly washed and cleansed daily, and no meats or other comestibles shall be exposed on the banquettes. They shall be closed punctually at 12 o'clock meridian of every day.

For any violation of any of the provisions of this section, the person offending shall be liable to a fine of not less than five nor more than twenty-five dollars, to be imposed and collected by the Recorder of the district in which the said market may be situated. In default of the payment of each and every fine so imposed, the person so defaulting shall be subjected to imprisonment for a time not to exceed thirty days nor less than five days.

3. That the Administrator of Commerce shall have full authority by himself or deputy to inspect all private markets at any hour when they may be open for business, and any refusal by any proprietor of a private market to permit such inspection shall render him liable to a fine to be imposed and collected as provided in the preceding section.

4. That no private market shall be permitted within a radius of six blocks of any public market of the city, as

per plan on file in the office of the administrator of commerce, designating and specifying the same and making part of this ordinance, and it shall be the duty of the chief of police, under the direction of the administrator of commerce, to causeany private market opened in violation of the provisions of this section to be closed; and any person opening a private market in violation of the provisions of this section and within the said prohibited distance, shall be liable to a fine of twenty-five dollars for each and every offence, said fine to be imposed and collected by the Recorder of the district in which said private market may be situated. In default of the payment of each and every fine so imposed, the person so defaulting shall be subject to imprisonment for a term not to exceed thirty days or less than five days.

5. That any person or persons applying to the Administrator of Finance for a license to keep a private market shall, before obtaining said license, produce a certificate from the Administrator of Commerce, showing the location of said private market, and that all the requirements of this ordinance have been complied with by the person or persons asking a license.

EXHIBIT C.

Final decree and opinion of the Supreme Court of the State of Louisiana in the case of State of Louisiana vs. J. Natal et al., No. 9935.

Appeal from first recorder's office, City of New Orleans.

CLERK'S OFFICE, NEW ORLEANS, March 21, 1887.

Mr. Chief Justice Bermudez pronounced the opinion and decree of the court in the words and figures following, to-wit:

The defendants' appeal from judgments rendered against them for the payment of a fine and in default of payment sentencing them to imprisonment for the violation of ordinance No. 4798, A. S., which forbids the keeping of private markets within six squares of a public market within the limits of the City of New Orleans.

The facts are admitted.

Several defences are set up, the main of which is that the law in furtherance of which the ordinance was adopted, as well as the ordinance itself, have been abrogated, annulled, and repealed, and are no longer in force; that therefore the fine imposed under the authority of the ordinance is illegal for want of a law, and that this court has consequently jurisdiction over the causes.

It is claimed that this repeal results from the adoption of the present city charter in 1882, with which the law conflicts.

The defendants further urge that the law of 1878, under the provisions of which the ordinance was passed, contemplated a monopoly and was abrogated by the present charter and is in violation of the Constitution of the United States.

We consider that these and other objections to the constitutionality or legality of the ordinance in question and others similar to it have been already considered and judicially determined in favor of the regulation.

Besides, the defendants in the instant cases have not urged them on appeal, and may be considered as having abandoned all resistance on those grounds. Dillon on Mun. Corp. 380; 3 La. 217; 4 A. 335; 27 A. 417; 31 A. 544; 36 A. 986 (No. 8603 of the docket of this court, not reported in full; also in cases Nos. 9582, 9583, 9584, not yet reported).

So that the only question now to be solved is whether the ordinance was or not repealed.

The ordinance in question, No. 4798, A. S., was adopted in 1878 under the provisions of Act No. 100 of the Legislature previously adopted in the same year, the object of which was the regulation of private markets in the City of New Orleans. From that time to the present day it has uniformly been enforced; what resistance was ever made to its application having been judicially pronounced groundless and unauthorized.

The defendants in the present controversy, however, argue that the City of New Orleans in existence at the date of the passage of the law and of the adoption of the ordinance has ceased to exist as such under the operation of Act 20 of 1882, which is the charter of the city now in existence; that said law and said ordinance were not perpetuated, but were ignored and abrogated, by the last charter, and that the present prosecutions are attempts to enforce a defunct municipal regulation in violation of constitutional and statutory law and of the personal rights of the defendants.

The theory thus advanced rests upon the assumed proposition that the City of New Orleans in existence in 1878 is not the City of New Orleans in 1887.

This is a fallacy arising from a misconception and a confusion of ideas on the subject.

The City of New Orleans, founded by Bienville about 1718, has never ceased to exist as an agglomeration of human beings for social, commercial, and industrial purposes.

It is a growing fact which no legislation has ever blotted out and which no power can annihilate in a free country, although it be true that the form of government to which its inhabitants have been remitted or the mode in which it may exercise its rights and powers has from time to time been modified or changed. It is the *civitas* or *polis* of ancient times.

The inhabitants had a right to congregate and to establish a city for their greater comfort and welfare. In the absence of any charter incorporating them they are, like the rest of the citizens in the country, ruled by general laws enacted for the government of all throughout the territory.

In 1806 those inhabitants were given a charter for the first time since the session of 1803, and that charter has been altered or amended some way or another in subsequent years, 1812, 1818, 1833, 1836, 1837, 1848, 1850, 1852, 1870, and 1882, but the city, the existence of which was generally recognized by the various constitutions, has retained its identity, not only as a matter of fact, but also as a matter of legal necessity.

Whatever rights it originally possessed, whether because expressly conferred by the sovereign or because indispensably inherent to its nature and existence, it has continued to possess, unless where such rights have been recalled or denied by the properly constituted authority.

The present constitution, Article 254, gave authority to the General Assembly to cancel its charter and to remit its inhabitants to another form of government if necessary.

The Legislature did not, however, formally cancel its previous charter, although it changed the form of the municipal government.

This is apparent from the reading of the last section of the charter of 1882, which merely repeals the laws in conflict, inconsistent with, or contrary to the provisions of the act.

By irresistible and clear implication this section contemplates in effect the maintenance and continuation in force of special laws not falling within the purview of the act, namely, not conflicting with it.

It will not do to say that in the beginning of the act it is declared that the inhabitants of the parish of Orleans were created a body corporate and established as a political corporation by the name of the City of New Orleans, for the fact is that the Legislature did not and could not create the City of New Orleans, which had existed long before the Act of 1882.

To create is to bring to life, to animate, to vivify that which never existed before.

What the Legislature did was to continue the City of New Orleans as a municipal corporation and to invest it with powers which it did not previously possess or to impose on it obligations to which it had not been subjected. The charter is the machinery whereby the city is put in motion and operates.

This is so true that the charter of 1882 transfers to the actual city all the rights of any nature whatever which the city then in existence possessed and enjoyed.

SECTION 28.

The laws which from time to time have been specially passed for the government and administration of the municipal affairs of the City of New Orleans have therefore continued in force, except such as may have been modified or repealed, expressly or impliedly.

The same may be said of what ordinances and regulations which the city may have passed in furtherance of these laws.

Hence when the laws are modified or repealed the municipal legislation in pursuance thereof is altered or recalled, but when those laws remain unchanged, as in the present case, that municipal legislation continues in full force and effect, while it remains subject itself to modifications by its framers.

This proposition is so palpably evident that it is upon it that the defendants have built up the theory that the Act of 1878, under the authority of which the ordinance in question was adopted, having been repealed, the ordinance in question, which is an outgrowth of it, has died away with it.

The city charter of 1882 does not purport to have repealed in any manner, expressly or impliedly, the Act of 1878, which is a special law. On the contrary, as that act is in no way in conflict or inconsistent with or contrary to the provisions of the new charter, the irresistible inference is that it has continued in full force and that the ordinance passed in execution of it to regulate the distance at which private markets shall be kept from public markets has likewise continued in effect and must be enforced in all proper causes.

The conclusions which we have reached are supported by good authority:

Dillon on Mun. Corp., 3d ed., Nos. 171, 172; City of Marysville vs. Shultz, 3 Dana, Ky. 11; City of Olney vs. Harvey, Ill. Rep. 50, 454; Trustees Erie Academy vs. City of Erie, Pa. R. 31, 519; Frank vs. City of San Francisco, 21 Cal. 668; Girard Heirs vs. Philadelphia, 7 Wal. 1; Broughton vs. Pensacola, 93 U. S. 266.

In this last case the highest tribunal of the land distinctly held that a change in the charter of a municipal corporation or the substitution of a new charter in place

EXHIBIT D.

No. 20.] AN ACT

To incorporate the City of New Orleans, provide for the government and administration of the affairs thereof; and to repeal all acts inconsistent and in conflict with its provisions.

Due public notice having been given according to requirements of Article 48 of the Constitution.

* * * * * * * *

Section 7. The Council shall have power and it shall be their duty to pass such ordinances and to see to their faithful execution as may be necessary and proper; 1, to preserve the peace and good order of the city; 2, to maintain its cleanliness and health, and to this end; (*a*) to adopt and provide an efficient system of drainage; (*b*) to provide for the inspection and cleanliness of all vaults, privies, yards, pools, markets, cemeteries; (*c*) to regulate the location of and inspection and cleansing of dairies, stables, cattle yards, landings and pens, slaughter houses, soap, glue, tallow and leather factories, depositories for hides, and all places or business likely to be or become detrimental to health, and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health, and to prevent the spread of disease and to maintain a good sanitary condition in the streets, public places and buildings, and on all private premises. The Common Council shall provide for the frequent inspection of all premises by persons to be designated, either by the Common Council or by the Board of Health in the city; they shall also prescribe what water supply shall be provided by the owners of private premises, and that all premises, yards, streets and alleys shall be kept in a cleanly condition; shall provide for the punishment of any violation of such ordinances or regulation, by fine or imprisonment or both; and all such fines, when recov-

of the old one will not be deemed, in the absence of express legislative declaration, otherwise to effect the identity of the corporation.

See also Toullier Dr. Civ. Fr. L. L. T. 1, No. 202, Henry de Pansey Pouvoir Municipale, p. 36, 37; also 2 Woods, 632, Milner's Administrator vs. Pensacola.

It is therefore ordered and decreed that the judgment appealed from be affirmed with costs.

Rehearing refused April 11, 1887.

ered, shall be paid over to the Board of Health, to assist in its maintenance; (*d*) to suppress all nuisances; (*e*) to prevent the sale of adulterated or decayed food, and punish the same; to punish the sale of adulterated drinks; (3) to open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks; (4) to keep the streets and crossings and bridges and canals and ditches clean and in repair; (5) to organize and provide an efficient police; (6) to light the streets, wharves, landings and public squares; (7) to organize and maintain free public schools; (8) to provide for the extinguishing of fires; (9) to maintain levees, dykes, and to protect the city from overflow.

* * * * * * * *

Section 28. That all the rights, titles and interest of the City of New Orleans, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property of whatever description and wherever situated, and with all goods, chattels, moneys, effects, debts, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of actions, books, accounts and vouchers, be and they are hereby vested in the City of New Orleans, as incorporated by this act.

* * * * * * * *

Section 78. All laws in conflict, inconsistent or contrary to the provisions of this act, be and the same are hereby repealed.

R. N. Ogden,
Speaker of the House of Representatives.

Geo. L. Walton,
President *pro tem.* of the Senate.

Approved June 23, 1882.

S. D. McEnery,
Governor of the State of Louisiana.

A true copy:
Will. A. Strong, Secretary of State.

EXHIBIT E.

No. 134.] AN ACT

To authorize all persons who have obtained the proper license to open and keep open at all business hours of the day, private markets, stores or stands, in any part of the City of New Orleans, for the sale of meats, game, poultry, vegetables, fruit and fresh fish.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That from and after the first day of January, 1867, it shall be lawful for all persons, after they have obtained the license required for retailers of provisions, to open and keep open at all proper hours of the day, private markets, stores or stands, in any part of the City of New Orleans, for the sale of meats, game, poultry, vegetables, fruit and fresh fish, subject to the general sanitary ordinances of the City Council.

SEC. 2. *Be it further enacted, etc.*, That all laws and parts of laws contrary to or inconsistent with the provisions of this act be, and the same are hereby repealed.

[Signed] J. B. ELAM,
Speaker *pro tem.* of the House of Representatives.

[Signed] ALBERT VOORHIES,
Lieutenant Governor and President of the Senate.

Approved March 22, 1866.

[Signed] J. MADISON WELLS,
Governor of the State of Louisiana.

A true copy:
J. H. HARDY,
Secretary of State.

EXHIBIT F.

No. 31.] AN ACT

To regulate the private markets in the City of New Orleans, and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That it shall [be] and it is hereby made unlawful for any person or persons to open, conduct, carry on, or to continue any private market for the sale of fresh meats, poultry, fresh fish, etc., in the City of New Orleans, within the space of twelve squares of any public market, under the jurisdiction and authority of the Administrator of Commerce of the said City of New Orleans.

SEC. 2. *Be it further enacted, etc.*, That the Administrator of Commerce be and is hereby authorized and directed to close or cause to be closed any private market that may hereafter be established for the sale of meats, poultry, etc., in violation of the provisions of section one of this act.

SEC. 3. *Be it further enacted, etc.*, That for any violation of this act, the party or parties so violating shall be subject to a fine of one hundred dollars, or imprisonment not less than three months or more than six months, or both at the discretion of the court. It is hereby made the duty of the Administrator of Commerce to give information to the grand jury of the Parish of Orleans of any party or parties who have violated the said provisions of this act.

SEC. 4. *Be it further enacted, etc.*, That it shall be the duty of the judge of the First District Court of the Parish of Orleans to charge each new grand jury as to the provisions of this act.

SEC. 5. *Be it further enacted, etc.*, That upon the reverse side of each and every license granted by the State of Louisiana or to the City of New Orleans for the carrying on, conduction and operation of a private market for the sale of fresh meats, poultry, fresh fish, etc., the following words shall be printed thereon: "It is distinctly understood that the holder of this license shall not open, establish or carry on a private market

within twelve squares of any public market, under penalty of a forfeiture of this license."

SEC. 6. *Be it further enacted, etc.*, That this act shall take effect from and after its passage, and that all laws or parts of laws in conflict with the provisions of this act be and the same are hereby repealed.

[Signed] CHARLES W. LOWELL,
Speaker of the House of Representatives.

[Signed] C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Received in the House of Representatives, Wednesday, February 25, 1874, and on the same day the House proceeded, pursuant to the provisions of the Constitution of the State, to reconsider the bill to be entitled "An act to regulate the private markets of the City of New Orleans and for other purposes," which was returned to the House by his excellency the Governor with his objections, and it was resolved that the bill do pass, two-thirds of all the members present in the House having agreed to pass the same. WILLIAM VIGERS,
Chief Clerk House of Representatives.

Received in the Senate, Thursday, February 26, 1874, and on the same day the Senate proceeded, pursuant to the provisions of the Constitution of the State, to reconsider the bill to be entitled "An act to regulate the private markets of the City of New Orleans and for other purposes," which was returned to the House of Representatives by his excellency the Governor with his objections, and it was resolved that the bill do pass, two-thirds of all the members present in the Senate having agreed to pass the same. P. E. BECHTEL,
Secretary of the Senate.

A true copy:
P. G. DESLONDE,
Secretary of State.